SUPREME COURT, U.S.
FILED
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MICHAEL RODAK, JR.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

72-1080

ARCHIE PELTZMAN,

Petitioner,

against

AMERICAN RADIO ASSOCIATION, *et al.*,

Respondent.

On Petition for Rehearing to the Court of Appeals of the State of New York

PETITION FOR REHEARING

ARCHIE PELTZMAN,
Petitioner Pro Se,
8725 16th Avenue,
Brooklyn, N. Y. 11214

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1972

No. 72-1080

ARCHIE PELTZMAN, Petitioner

v

AMERICAN RADIO ASSOCIATION, et al,

Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK.

PETITION FOR REHEARING

Petitioner prays that this Court grant rehearing of its order of April 2, 1973 denying the petition for writ of certiorari, that a writ of certiorari issue to review the judgment of the Court of Appeals of the State of New York in the above - entitled case.

Grounds For Rehearing

Petitioner wishes to argue the following substantial grounds available to him although not previously presented.

I. Petitioner wishes to cite three English cases holding in substance that rules or regulations whether of a trade union, Edwards v Society of Graphical and Allied Trades (1968 E.No 954 I Ch.(Court of Appeal), a Jockey Club, Nagle v Fields and others 2 Q.B. 633 C.A. (1966), or a pharmaceutical society, Pharmaceutical Society of Great Britain and another, v Dickson (1968) (H.L.(E), A.C., are ultra vires and will be struck down by the Courts when such rules or regulations are an interference with a man's right to work which the law will protect, (per Lord Denning M.R.) and (per Sachs L.J.) are ultra vires and an unlawful restraint of trade, a fortiori in an industry where trade union membership is a prerequisite for employment (post pp 377 A-C, 382E-383B,) and the true grounds of jurisdiction in cases relaing to deprivation of employment rights is a man's right to work, (per Lord Denning's opinion in Nagle case supra p 646)(App 3a).

2. In the Edwards case supra on p375-376 (App Ia),Lord Denning M.R. discussing the rules by which the union claimed the power to remove Edwards under thier rules,and Rule I8 (4) (j) says,

" It is a condition of acceptance of membership that holders of such (temporary) cards must relinquish same immediately upon application by the branch committee responsible for thier issue and shall have no claim upon the union or its funds."

"Temporary members shall not have any right of appeal from any decision of thier branch committe or the executitive council."

(Quotes of Lord Denning)....

This point was not taken in the Court below;and I have had some doubt whether it should be allowed here.But,as it is a point of law which no further evidence can help,I think we should consider it. But I desire to say quite clearly that I think the point is bad,and for this reason; I do not think this trade union or any other trade union can give itself by its rules

an unfettered discretion to expel a man or to withdraw his membership.The reason lies in the mans right to work.This is now fully recognized by law.It is a right which is of especial importance when a trade union operates a "closed shop" or 100 percent membership for that means that no man can be employed or remain in employment with a firm unless he is a member of the union.If his union card is withdrawn,he has to leave the employment, he is deprived of his livelihood.The Courts of this country will not allow so great a power to be exercised arbitrarily or capriciously or with unfair discrimination, neither in the making of rules,nor in the enforcement of them.The law has means at its disposal.A trade union exists to protect the rights of each one of its members to earn his living and to take advantage of all that goes with it.It is the very purpose of its being.If the union should assume to make a rule which destroys that right and puts it in jepordy - or is a gratutious and oppressive interference with it - then the union exceeds its powers. The rule is ultra vires and invalid.Thus

if the union should make a rule purporting to give itself uncontrolled discretion to expel a member without hearing him, that rule would be bad. No union can stipulate for a power to expel a man unheard; see Faramus v Film Artistes Association (1964) A.C. 925, 947, per Lord Pearce. And the union cannot get round it by calling him a "temporary member". A temporary is just as much a member of the union as a full member. He pays his dues just the same, and he is entitled to equal protection by the law. The union has no right to expel a temporary member arbitrarily any more than it has a right to expel a full member. To call him a "temporary member" is only a covert way of claiming to exclude him at thier discretion; and as such it cannot be allowed.....
The union excluded him by virtue of a rule commonly called the "automatic forfeiture" rule. It is rule I8 (4) (h) which says "temporary membership shall terminate automatically if the member becomes [illegible] six weeks in arrears."

That rule is so positive in its language that I see no way of limiting it,not by way of construction ,nor by way of an implied term.Why then does it not apply in this case? I think it is for this simple reason;this rule,like the other, is invalid.It is an unwarranted enroach - ment on a mans right to work.....Such conduct can not be permitted.It is ultra vires.No union can stipulate for automatic expulsion of a man without giving him the oppurtunity of being heard;see what Lord Eversbed said in the Faramus case (1964) A.C. 925 at 941.

3. From opinion of Sachs L.J. p 382, (App2a) Quote

The Courts have always protected a man against any unreasonable restraint on his right to work even if he has bargained that right away and it matters not whether the bargain is with an employer or with a society (see Dickson v Pharmaceutical Society of Great Britain 1970) A.C.403 and the case there cited.)

4. From Lord Denning's opinion in Nagle case (supra),p 646d (App 3a)

All through the centuries Courts have

given themselves jurisdiction by means of fictions; but we are mature enough, I hope to do away with them. The true ground of jurisdiction in all these cases is a mans right to work. I have said it before, and I repeat it now, that a mans right to work at his trade or profession is just as important to him as, perhaps more important than his rights of property. Just as Courts will interevene to protect his rightsof property, they will also interevene to protect his right to work .

5. Petitioner believes his case is identical to the Edwards case, and the Nagle and Pharmaceutical case holdings support his arguments and pleadings below that his Constitutional rights have beendenied him. See Syllabus of those cases in(App 3a ,4a)

Conclusion

For the reasons set forth above and in the petition for writ of certiorari, it is respectfully urged that rehearing be granted, and that upon such rehearing , a writ of certiorari issue to the Court of Appeals of the State of New York.

Respectfully submitted

Archie Peltzman

Archie Peltzman
Petitioner Pro Se

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Certificate of Counsel

I hereby certify that the foregoing petition for rehearing is presented in good faith, and not for delay and is restricted to grounds specified in Rule 58 of the Rules of this Court.

Archie Peltzman

Archie Peltzman
Petitioner Pro Se

April 9, 1973

an application to the Lands Tribunal for whatever degree of expedition of hearing it is possible to afford.

Motion for mandatory order dismissed. Cross motion for leave to apply to Lands Tribunal and staying the action in the meantime granted.

Solicitors: *Theodore Goddard & Co., for Morgan, Bruce & Nicholas, Cardiff: Holman, Fenwick & Willan for Lean & Lean, Cardiff.*

K. N. B.

[COURT OF APPEAL]

EDWARDS *v.* SOCIETY OF GRAPHICAL AND ALLIED TRADES

[1968 E. No. 954]

1969 Nov. 25, 26, 27 — Buckley J.
1970 July 15, 16, 17, 20; 30 — Lord Denning M.R., Sachs and Megaw L.JJ.

Trade Union—Membership—Wrongful termination—Temporary member wrongfully deprived of union card and dismissed from union shop—Assessment of damages—On appeal, union's undertaking to grant full membership—Effect on estimate of future loss.

Damages—Earnings, loss of—Trade union—Wrongful exclusion from membership—Measure of damages—Basis of assessment—Actual financial loss plus sum for estimated future loss—Duty to mitigate damages by reasonable conduct.

Trade Union—Rules—Validity—Rule giving unfettered power to deprive temporary member of union card—No provision for natural justice or right of appeal—Loss of union membership affecting right to work—Whether void as in restraint of trade—Whether ultra vires.

A trade union covering a wide range of employment in the printing industry divided its membership into temporary and full members. Rule 18 (4) (h) provided that "temporary membership shall terminate automatically if the member becomes over six weeks in arrears" and sub-rule (4) (k) provided that "temporary members shall not have any right of appeal from any decision of their branch committee or the executive council." The plaintiff, a skilled craftsman in Grade I, had since 1960 been employed in a "100 per cent." union firm and was a temporary member of the union. Under a scheme operated by the union he authorised the deduction by his employers of his weekly union dues from his pay. By an oversight on the part of a union official the deductions were not made or paid over; but he was unaware of that until his local union official told him that by virtue of rule 18 (4) (h) he had ceased to be a member. Two applications for readmission

were rejected by his branch committee; and his employers were required by threat of strike action to dismiss him. In the area where he lived, work in his grade was in short supply and the union operated virtually as the labour exchange for vacancies. He was unemployed for some months.

In May, 1968, he began an action against the union claiming, inter alia, damages for breach of contract and a declaration that he was still a member. The union at first put in a defence that he had been properly excluded. Later the plaintiff obtained work in a non-union firm but was dismissed in May, 1969, when he refused to do a task outside his contract terms. He again became unemployed and received unemployment pay. In April, 1969, the union admitted that he had at all times retained his temporary membership and thereafter supplied him with particulars of some vacancies; but as they either were or appeared to be of the lowest grade he did not take them up.

On the trial of the action where the only issue was that of damages, Buckley J. awarded him the whole of his actual financial loss to the date of trial and a sum for future loss of earning capacity assessed on the formula applied in personal injury cases, namely, the yearly loss multiplied by ten, the total damages being £7,971.

On the union's appeal against the quantum of damages, it was submitted for the first time that as the union rules provided no security for temporary members the damages should be nil or at least that nothing should be awarded for future loss. At a late stage in the appeal the union undertook to grant the plaintiff full membership, a status which gave security in membership and under normal union practice would give some priority for suitable vacancies:—

Held, allowing the appeal by reducing the total award to £3,500, (1) that damages for the admitted breach of contract should consist of (a) the plaintiff's actual loss, viz. the difference between what he would have earned if he had remained in the union shop and what he in fact received in wages and benefit to the date of assessment, less such amount as the union might prove was due to his failure to act reasonably to mitigate the damage; and (b) an estimate of his future loss of earning capacity attributable to the withdrawal of his union card.

(2) That the plaintiff was entitled to the whole of his actual loss, for the union had not proved that he did not act reasonably in mitigation of the damage.

(3) That in estimating the future loss the court had to take into account the union's grant of full membership, albeit at a late stage in the proceedings, as a factor which should enhance his prospects of regaining his full earning capacity in a union shop and thereby reduce the damages awarded on the basis of only temporary membership, but in view of the union's previous conduct should balance against that factor his chances of getting the help which the union normally gave to full members and its control of vacancies in the industry.

Per Lord Denning M.R. and Sachs L.J. The assessment of future loss of earning capacity in an action for a trade union's breach of contract vis-à-vis a member is in some respects not analogous to the assessment of future loss in cases of personal injury for the union can mitigate future loss by restoring membership (post, pp. 378A–C, 379C–D).

(4) (*Per* Lord Denning M.R. and Sachs L.J.) That those provisions of rule 18 (4) which gave the union an unfettered

right capriciously and arbitrarily to withdraw temporary membership without regard to the rules of natural justice were invalid because (*per* Lord Denning M.R.) such rules are an interference with a man's right to work which the law will protect, and (*per* Sachs L.J.) are ultra vires and an unlawful restraint of trade, a fortiori in an industry where trade union membership is a prerequisite for employment (post, pp. 377A–C, 382B–383B).

Award of Buckley J., infra, pp. 357, 365D–E; [1970] 1 W.L.R. 379; [1970] 1 All E.R. 905 varied.

The following cases are referred to in the judgment in the Court of Appeal:

Addis v. *Gramophone Co. Ltd.* [1909] A.C. 488, H.L.(E.).
Cockburn v. *Alexander* (1848) 6 C.B. 791.
Dickson v. *Pharmaceutical Society of Great Britain* [1970] A.C. 403; [1968] 3 W.L.R. 286; [1968] 2 All E.R. 686, H.L.(E.).
Faramus v. *Film Artistes Association* [1964] A.C. 925; [1964] 2 W.L.R. 126; [1964] 1 All E.R. 25, H.L.(E.).
Lavarack v. *Woods of Colchester Ltd.* [1967] 1 Q.B. 278; [1966] 3 W.L.R. 706; [1966] 3 All E.R. 683, C.A.
Murphy v. *Stone-Wallwork (Charlton) Ltd.* [1969] 1 W.L.R. 1023; [1969] 2 All E.R. 949, H.L.(E.).
Nagle v. *Feilden* [1966] 2 Q.B. 633; [1966] 2 W.L.R. 1027; [1966] 1 All E.R. 689, C.A.

The following additional cases were cited in argument in the Court of Appeal:

Abbott v. *Sullivan* [1952] 1 K.B. 189; [1952] 1 All E.R. 226, C.A.
Bonsor v. *Musicians' Union* [1954] Ch. 479; [1954] 2 W.L.R. 687; [1954] 1 All E.R. 822, C.A.
Brace v. *Calder* [1895] 2 Q.B. 253.
British Guiana Credit Corporation v. *da Silva* [1965] 1 W.L.R. 248, P.C.
Clayton Greene v. *De Courville* (1920) 36 T.L.R. 790.
Curwen v. *James* [1963] 1 W.L.R. 748; [1963] 2 All E.R. 619, C.A.
Dawkins v. *Antrobus* (1881) 17 Ch.D. 615, C.A.
Jackson v. *Hayes Candy & Co. Ltd.* [1938] 4 All E.R. 587.
Jenkins v. *Richard Thomas & Baldwins Ltd.* [1966] 1 W.L.R. 476; [1966] 2 All E.R. 15, C.A.
Lawlor v. *Union of Post Office Workers* [1965] Ch. 712; [1965] 2 W.L.R. 579; [1965] 1 All E.R. 353.
Lee v. *Showmen's Guild of Great Britain* [1952] 2 Q.B. 329; [1952] 1 All E.R. 1175, C.A.
Martin v. *Amalgamated Society of Painters and Decorators*, The Times, July 10, 1968.
Morgan v. *Fry* [1968] 1 Q.B. 521; [1967] 3 W.L.R. 65; [1967] 2 All E.R. 386.
Padfield v. *Minister of Agriculture, Fisheries & Food* [1968] A.C. 997; [1968] 2 W.L.R. 924; [1968] 1 All E.R. 694, C.A. and H.L.(E.).
Rookes v. *Barnard* [1964] A.C. 1129; [1964] 2 W.L.R. 269; [1964] 1 All E.R. 367, H.L.(E.).
Russell v. *Norfolk (Duke of)* [1949] 1 All E.R. 109, C.A.
Weinberger v. *Inglis* [1919] A.C. 606, H.L.(E.).
Wood v. *Woad* (1874) L.R. 9 Exch. 190.
Yetton v. *Eastwoods Froy Ltd.* [1967] 1 W.L.R. 104; [1966] 3 All E.R. 353.

The following case is referred to in the judgment of Buckley J.:

A *Yetton* v. *Eastwoods Froy Ltd.* [1967] 1 W.L.R. 104; [1966] 3 All E.R. 353.

The following additional case was cited in argument before Buckley J.:

Jackson v. *Hayes Candy & Co. Ltd.* [1938] 4 All E.R. 587.

B APPEAL from Buckley J.

On May 10, 1968, the plaintiff, Beresford Edwards, of Platt Street, Moss Side, Manchester 15, issued a writ against the Society of Graphical and Allied Trades, of Sogat House, London, S.E., and by his amended statement of claim claimed declarations that he was, and at all material times continued to be, a member of the union; that his purported expulsion was C null and void; and alternatively that the refusal to readmit him to membership was improper, wrongful, null and void. He also asked for an injunction to restrain the union from doing any act calculated directly or indirectly to interfere with his prospects of obtaining employment in the printing industry, and for damages. By its defence served on July 3, 1968, the union claimed that as a temporary member the plaintiff knew that he was subject to the general rules of the union which provided, inter alia, D that temporary membership "shall terminate automatically if the member becomes over six weeks in arrears"; admitted that he had paid his weekly contribution until March 27, 1965, but denied that he was requested to permit his weekly contributions to be deducted or that he had given his written consent thereto. The union, after alleging a number of specific complaints against the plaintiff, claimed that on November 13, 1967, the E branch committee had fairly and properly considered the plaintiff's application for readmission and had rejected it on the ground that he had been given a fair and reasonable opportunity to state his case on his first application for readmission before the branch on May 2[illegible], 1966, and on further grounds relating to his conduct after May 2[illegible] 1966. It was denied that he was either victimised or singled out for unfair treatment and it was contended that in so far as he was disabled from being a member of F the union chapel at the firm where he worked he was the author of his own misfortune.

On April 9, 1969, the union admitted that it had been wrong in asserting that the plaintiff was not a member. In the result the only issue on the trial of the action before Buckley J. in November 1969, was the issue of damages.

G

Peter Pain Q.C. and *Anthony Lester* for the plaintiff.
Rodney Bax Q.C. and *M. R. Hickman* for the union.

BUCKLEY J. The plaintiff in this action is a Guyanese gentleman. He is now 39 years of age, he is married and he has four children. He came to this country in 1960, having previously had experience of the printing H trade in Guyana, where his family have, as I understand it, a printing business, in which, from a comparatively early age, he acquired practical knowledge. He obtained employment in this country with a printing business in Manchester called Hugh Stevensons. He acquired that employ-

July 3, 1968, the union put in a defence, saying that his membership had automatically terminated by reason of arrears and that his application for readmission had been properly rejected. A

2. *The incident at Boxmakers*

Nevertheless, although he was not a member of the union, Mr. Edwards sought other work. He went to a firm which did not employ union men. It was a "non-union shop"—Boxmakers Ltd. He started with them on B September 9, 1968, as an assistant. He soon proved himself so capable that he was put onto a Heidelberg cutting-and-creasing-cylinder machine. But he earned less money. Whereas he averaged £29 7s. 9d. a week at Hugh Stevensons, he only averaged £22 a week at Boxmakers.

Six months later, while he was still working for Boxmakers, the union gave up their defence in the action. On April 9, 1969, they agreed that C his purported expulsion from the union was null and void and that he had at all times remained a temporary member of the union. They said they were prepared to submit to declarations to that effect and for damages to be assessed.

Shortly afterwards, however, Mr. Edwards lost his employment at Boxmakers. On May 1, 1969, he came to loggerheads with them. It happened in this way: Mr. Edwards was doing work for which he required D "stillages" (that is, flat pieces of wood on legs) to put the material on. There were none available on the morning of May 1, 1969. The reason was because the labourer who handled them had been away sick for five or six weeks. The firm had ordered more, but they had not arrived. So the foreman asked Mr. Edwards to unstack some so as to make more available. Mr. Edwards said he would not do it. The foreman called the E works manager, Mr Lynch. He explained the difficulties, but Mr. Edwards said: "I won't do it. It's not my job." Later on, after dinner, the works manager asked him again to do it. Mr. Edwards said again: "I won't." The works manager said: "That gives me no alternative but to send you home." Mr. Edwards said: "You can't do that. You will have to sack me." The works manager said: "I don't want to sack you but you F leave me no alternative." So the works manager dismissed him. He gave him one week's pay in lieu of notice. But he gave him a good reference in these words:

> "Mr. Beresford Edwards was in our employ from September 9, 1968, to May 1, 1969. We found him to be honest and a good time-keeper. He was employed on our Heidelberg Department dealing with printing; also cutting and creasing. His work was quite satisfactory." G

Finding himself out of work, Mr. Edwards applied for unemployment benefit; and, after inquiry, the Ministry granted it. Boxmakers told the Ministry, fairly enough, that it was no part of his contract to clear the stillages. So he got his unemployment benefit. But does his conduct count against him in assessing damages?

In point of law Mr. Edwards, I think, was entitled to take the stand he H did. He was asked to do something which was outside his proper work as a skilled man: and he refused. Other skilled men were likewise refusing, he said. But I must say I think he was being very uncooperative. Even though

it was no part of his contract, I should have thought that he might have helped clear the stillages so as to enable the work to proceed. Nevertheless, in assessing damages, I do not think this incident ought to be taken against him. It all flowed from the fact that he had been expelled from the union. Owing to his expulsion, he could only find work in Boxmakers, a non-union shop: and, working there, he had no union to back him up. If Boxmakers had been a union shop and Edwards a member of the union, there is no doubt that Boxmakers would not have dared to dismiss him: because the union would have supported him in his refusal. So it all flowed from his expulsion.

3. *The job at Deans of Stockport Ltd.*

After his dismissal from Boxmakers, Mr. Edwards tried to find work. By this time the union had agreed that he was still a temporary member. He asked them for a temporary membership card, but it was not forthcoming. The union did, however, put forward names of employers who had work to offer. But they turned out to be, not skilled work, but labourer's work: and, quite understandably, he refused, because, if he went to labourer's work, he would find it difficult to get back into skilled work. Then, on August 28, 1969, the union wrote and said that: "A general assistant's job in the letter-press machine department at Deans of Stockport Ltd. is available." Unfortunately, Mr. Edwards did not apply for it. He thought it was a general labourer's job again: and it was 12 miles away from his home. It was, in fact, a Grade III job which might have opened the way to skilled work. The union say he should have gone to see it. I rather think he ought, but, on the whole, I cannot say he was unreasonable. It was the union's mistake which had put him out of work: and they ought to have done everything possible to remedy it. They ought to have made it clear to him that it was a Grade III job.

The action came for trial in the last week of November, 1969. Seeing that the union had admitted that he was still a member, the only issue was damages. Incidentally, he had asked for a temporary membership card, but he did not get it until the second day of the hearing and they made him pay all the arrears from December, 1967. The judge awarded damages of £7,971. The union appeals to this court. On the second day of the hearing, after some comments from the court, the union promised to make him a full member.

4. *The rules*

I must at the outset consider a new point which was raised before us by Mr. Hooson Q.C. He said that Mr. Edwards was only a temporary member and that, under the rules, the branch committee had an unfettered discretion to remove him. Rule 18 (4) (j) says:

> "It is a condition of acceptance of membership that holders of such [temporary] cards must relinquish same immediately upon application by the branch committee responsible for their issue and shall have no claim upon the union or its funds."

Rule 18 (4) (k) says that:

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"Temporary members shall not have any right of appeal from any decision of their branch committee or the executive council." A

Mr. Hooson said that in assessing damages, therefore, it should be assumed that the union would have exercised their power under the rules to remove him: and he should, therefore, recover nothing. At any rate, he should recover nothing after the date of trial because the union would have removed him then. Mr. Hooson relied on the judgment of Diplock L.J. in *Lavarack* v. *Woods of Colchester Ltd.* [1967] 1 Q.B. 278, 294. B

This point was not taken in the court below: and I have had some doubt whether it should be allowed here. But, as it is a point of law, on which no further evidence can help, I think we should consider it. But I desire to say quite clearly that I think that the point is bad, and for this reason. I do not think this trade union, or any other trade union, can give itself by its rules an unfettered discretion to expel a man or to withdraw his membership. The reason lies in the man's right to work. This is now fully recognised by law. It is a right which is of especial importance when a trade union operates a "closed shop" or "100 per cent. membership": for that means that no man can become employed or remain in employment with a firm unless he is a member of the union. If his union card is withdrawn, he has to leave the employment. He is deprived of his livelihood. The courts of this country will not allow so great a power to be exercised arbitrarily or capriciously or with unfair discrimination, neither in the making of rules, nor in the enforcement of them. The law has means at its disposal. A trade union exists to protect the right of each one of its members to earn his living and to take advantage of all that goes with it. It is the very purpose of its being. If the union should assume to make a rule which destroys that right or puts it in jeopardy—or is a wrongful and oppressive interference with it—then the union exceeds its powers. The rule is ultra vires and invalid. Thus if the union should make a rule purporting to give itself uncontrolled discretion to expel a member without hearing him, that rule would be bad. No union can stipulate for a power to expel a man unheard: see *Faramus* v. *Film Artistes Association* [1964] A.C. 925, 947, *per* Lord Pearce. And the union cannot get round it by calling him a "temporary member." A temporary member is just as much a member of the union as a full member. He pays his dues just the same: and he is entitled to equal protection by the law. The union has no right to expel a temporary member arbitrarily any more than it has a right so to expel a full member. To call him a "temporary member" is only a covert way of claiming to exclude him at their discretion: and, as such, it cannot be allowed. C D E F G

I cannot leave the rules there. I think we must consider them further, even on the issue of damages. Mr. Edwards is entitled to damages for being wrongfully excluded from the union. That is now admitted. But why was it wrongful? The measure of damages may depend on the nature of the breach.

The union excluded him by virtue of a rule commonly called the "automatic forfeiture" rule. It is rule 18 (4) (h), which says: "Temporary membership shall terminate automatically if the member becomes over six weeks in arrears" H

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That rule is so positive in its language that I see no way of limiting it, not by way of construction, nor by way of an implied term. Why then does it not apply to this case? I think it is for this simple reason: this rule, like the other, is invalid. It is an unwarranted encroachment on a man's right to work. Just think. A man may fall into arrears without any real fault of his own. It may be due to oversight on his part, or because he is away sick, or on holiday. It may be due, as here, to the union's own fault in not forwarding the "check-off" slip. But, whatever the cause, this rule, if valid, would put it into the power of the union, as soon as a man was six weeks in arrears, either to enforce his exclusion, or to waive it, or to readmit him. They could be as arbitrary or capricious as they pleased. They could discriminate in favour of some and against others as they liked (as indeed Mr. Edwards thought happened to him). They could turn him out of his work without any good or sufficient cause. Such cannot be permitted. It is ultra vires. No union can stipulate for automatic exclusion of a man without giving him the opportunity of being heard: see what Lord Evershed said in the *Farumus* case [1964] A.C. 925 at p. 941.

Next, I would consider Mr. Edwards' application for readmission. Once he was excluded, the union treated his readmission as a matter for their discretion. He applied twice and each time he was refused. Such a refusal may sometimes be justified, as when the trade is oversupplied with labour. But it will not be justified if it is exercised in an arbitrary or capricious manner or with unfair discrimination: see *Nagle* v. *Feilden* [1966] 2 Q.B. 633, 637. In this case, seeing that Mr. Edwards was wrongfully excluded in the first place, it was doubly wrong to refuse him readmission.

5. *The damages*

Such being the wrongful exclusion, how are the damages to be measured? I think they are to be ascertained by putting the plaintiff in as good a position, so far as money can do it, as if he had never been excluded from the union, taking into account, of course, all contingencies which might have led to him losing his employment anyway: and remembering, too, that it was his duty to do what was reasonable to mitigate the damage. Before the judge, too, it was necessary to have regard to the fact that he had by that time been restored to temporary membership. Before us, too, we must remember that he has now been restored to full membership. We are entitled to take this into account, even though it is a matter which has arisen since the trial: see *Murphy* v. *Stone-Wallwork (Charlton) Ltd.* [1969] 1 W.L.R. 1023. It will considerably reduce the damages.

The loss up to the date of trial was as follows:

	£	s.	d.
Actual loss from date when he was dismissed by Stevensons (December 22, 1967) to date of trial (November 18, 1969). The wages he would have earned with Stevensons at £29 7s. 9d. a week	2,700	13	11
Less his earnings with Boxmakers (£22 a week) unemployment benefit and wages in lieu of notice ...	1,489	3	11
	£1.211	10	0

APPENDIX 3A

NAGLE v. FEILDEN AND OTHERS

C. A.

1956
Feb. 3, 4, 22.

LORD DENNING M.R., DANCKWERTS and SALMON L.JJ.

Contract—Formation—Intention to create legal relationship—Issue of training licences by Jockey Club—Repeated refusal to issue licences to woman trainer—Grant of licences to male employees—Whether contract between Jockey Club and woman applicant for licence—Whether refusal of licence because applicant a woman contrary to public policy—Sex Disqualification (Removal) Act, 1919 (9 & 10 *Geo.* 5, *c.* 71), *s.* 1.

Public Policy—Right to work—Trade association with monopoly powers—Refusal of licence by Jockey Club to woman trainer—Whether sex discrimination—Whether contrary to public policy—Sex Disqualification (Removal) Act, 1919 (9 & 10 *Geo.* 5, *c.* 71), *s.* 1.[1]

Restraint of Trade—Trade association—Monopoly powers—Right to work—Jockey Club's refusal of training licence to woman—Whether sex discrimination—Whether contrary to public policy—Sex Disqualification (Removal) Act, 1919, *s.* 1.[1]

Discrimination—Sex—Right to work—Whether woman entitled to train racehorses—Sex Disqualification (Removal) Act, 1919, *s.* 1.

The stewards of the Jockey Club controlled horseracing on the flat throughout Great Britain. They made rules of racing, sanctioned the holding of race meetings and no person was allowed to train horses for racing at their meetings unless he held a licence. The plaintiff, a woman, had trained racehorses for many years. It was the practice of the stewards to refuse to grant a trainer's licence to a woman in any circumstances. The

[1] Sex Disqualification (Removal) Act, 1919, s. 1: "A person shall not be disqualified by sex . . . from the exercise of any public function, or from being appointed to or holding any civil or judicial office or post, or from entering or assuming or carrying on any civil profession or vocation . . ."

C. A. 1966

Nagle v. Feilden

plaintiff had frequently applied for and been refused a trainer's licence, although the stewards had granted licences to men servants employed by her, in particular to her "head lad."

The plaintiff brought an action against the defendants, two stewards on their own behalf and on behalf of the stewards and members of the Jockey Club, claiming, inter alia, a declaration that the practice of the stewards in refusing a trainer's licence to any woman was void as against public policy and an injunction ordering the stewards to grant her a licence. John Stephenson J. affirmed the order of the master striking out the statement of claim and dismissing the action on the defendants' application, which claimed that it disclosed no cause of action. On the plaintiff's appeal:—

Held, allowing the appeal, that, although there was no contractual relationship between the parties, the plaintiff had an arguable case for claiming the relief sought on the ground that the practice of refusing a trainer's licence to a woman might be void as contrary to public policy (post, pp. 644G—645A, 647C-D, 651F, 655C-E).

Ipswich Tailors' Case (1614) 11 Co.Rep. 53a; *Davis* v. *Carew-Pole* [1956] 1 W.L.R. 833; [1956] 2 All E.R. 524; *Weinberger* v. *Inglis* [1919] A.C. 606, 631, 636, 642; 37 T.L.R. 399; and dicta of Lord Pearce in *Faramus* v. *Film Artistes Association* [1964] A.C. 925, 946; [1964] 2 W.L.R. 126; [1964] 1 All E.R. 25, H.L. (E) applied.

Rex v. *The Benchers of Lincoln's Inn* (1825) 4 B. & C. 855 and dicta of Denning L.J. in *Russell* v. *Duke of Norfolk* (1948) 65 T.L.R. 225, 231; [1949] 1 All E.R. 109, C.A. considered.

Per curiam. A man's right to work at his trade or profession is just as important to him as his rights of property. Just as the courts will intervene to protect his rights of property, so they will also intervene to protect his right to work (post, pp. 646E, 650D, 655C-E).

Quaere whether the training of racehorses is a vocation within the meaning of section 1 of the Sex Disqualification (Removal) Act, 1919 (post, pp. 647D, 651E, 656A-D).

Per Danckwerts L.J. The law relating to public policy must change with the passage of time (post, p. 650C).

Per Salmon L.J. One of the principal functions of the courts is, whenever possible, to protect the individual from injustice and oppression (post, p. 654F).

Decision of John Stephenson J. reversed.

APPEAL from John Stephenson J.

The plaintiff, Florence Nagle (femme sole), issued a writ on July 2, 1965, against the defendants, Sir Randle Guy Feilden and the Right Honourable Wentworth Hubert Charles, Viscount Allendale, sued on their own behalf and on behalf of the stewards and all other members of the Jockey Club.

The statement of claim as amended, alleged inter alia, as follows: The defendants had been nominated by the solicitors of the Jockey Club as the defendants to the action. The Jockey Club was a self-electing body which at all material times had been recognised by the custom of the realm as one of the turf authorities of Great Britain. It held itself out as controlling horseracing on the flat in Great Britain. For the purpose of exercising such control the Jockey Club sanctioned the holding of flat race meetings throughout Great Britain and all such meetings and races were subject to the rules issued by them called the Rules of Racing. It was the custom of the realm for such control and for the Rules of Racing to be accepted by all persons concerned in horseracing on the flat. The Rules of Racing provided, inter alia, by rule 17 that the stewards of the Jockey Club had power at their discretion to grant licences to trainers; by rule 66 (B) that no horse should be qualified to run unless he was trained by a licensed trainer; by rule 102 (i) that every trainer in Great Britain must obtain an annual licence. Accordingly, the Jockey Club and their stewards held themselves out as exercising a monopoly in the control of horseracing on the flat in Great Britain and they were under a duty to all persons concerned in horseracing on the flat to exercise such control lawfully and reasonably and in accordance with the Rules of Racing and not to exercise capriciously any discretion vested in them by the rules. Further or alternatively the Jockey Club expressly and/or impliedly offered to prospective applicants that it would through its stewards give consideration in accordance with the Rules of Racing to the granting of training licences. It was an implied term of any such offer that in considering any applications for training licences the stewards would act reasonably and would not exercise capriciously any discretion vested in them by the Rules of Racing. It was and had at all material times been the practice of the stewards to refuse to grant a licence to train racehorses to any female applicant for such licence on the sole ground that such applicant was a female. Such practice constituted a breach of the duty owed and further or alternatively prevented females from earning their living by or from carrying on the trade or business of training racehorses and was unlawful and in restraint of trade and contrary to public policy. At all material times and since about 1938, it had been well known to the stewards that the plaintiff had managed, controlled and carried out all the duties and responsibilities of a trainer in respect of racehorses being trained from about 1938 to about 1942 at Sulhamstead, Reading, in Berkshire and from about 1942 onwards at Westerlanus, Petworth, in Sussex and that such horses had been raced under the Rules of

APPENDIX 4A

A PHARMACEUTICAL SOCIETY OF GREAT BRITAIN AND ANOTHER . . . . APPELLANTS

AND

DICKSON . . . . . RESPONDENT

[ON APPEAL FROM DICKSON *v.* PHARMACEUTICAL SOCIETY OF GREAT BRITAIN]

B

1968 March 18, 19, 20, 21, 25, 26; May 29 — Lord Reid, Lord Morris of Borth-y-Gest, Lord Hodson, Lord Upjohn and Lord Wilberforce

Corporation — Powers — Professional body — Whether member entitled to test validity of proposed rule of professional conduct.

C *Restraint of Trade — Professional body — Pharmacists — Use of powers to restrict trade activities of members—Non-contractual relationship—Whether involuntary restraint of trade—Whether member entitled to relief—Whether a restraint of trade contrary to public policy outside powers of controlling body.*

A society incorporated by Royal Charter and recognised by statute as representing the profession of registered pharmacists had among its objects that of maintaining the honour and safeguarding and promoting the interests of the members "in their exercise of the profession of pharmacy." All registered pharmacists were required to be members, and limited companies employing registered pharmacists and carrying on chemists' businesses in premises registered under the Pharmacy Acts were also thereby brought within the society's jurisdiction. The society's governing body was a council with power to make by-laws in furtherance of the objects. Its disciplinary body was an independent statutory committee which could inquire into charges of misconduct against a member and strike off the register a particular pharmacist or company premises. In considering misconduct the statutory committee had regard to the code of ethics laid down by the society for guidance on professional conduct. The code of ethics, though said to be binding only in honour, had practical force and normally 90 per cent. of the membership complied with its provisions. There was a right of appeal from the statutory committee to the High Court.

The society, being concerned at the extension of the range of non-pharmaceutical goods sold in chemists' shops and the effect which it might have on the quality and status of the profession, proposed a new rule for inclusion in the code of ethics and submitted it in the form of a motion to a specially convened meeting of the members. The effect of the rule would be that, save with the approval of the council, new pharmacies would have to be situated in physically distinct premises and their trading activities confined to pharmaceutical and traditional goods as defined in the report of a committee on the general practice of pharmacy; and existing pharmacies would not, without the council's approval, be able to extend their present range of non-traditional goods. At the meeting, which was attended by some 6,000 of the society's 29,000 members, the motion was passed by a majority of 3,690.

The respondent, a member of the society, brought an action for a declaration that the motion, if implemented, would be

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ultra vires the society's objects and in unreasonable restraint of trade, and therefore would be contrary to public policy; and he asked also for an injunction to restrain the society from enforcing it. The society claimed that the motion was intra vires; that a dispute as to a rule of professional conduct binding only in honour was not justiciable in the courts save on appeal from the disciplinary committee; and that as the doctrine of restraint of trade did not apply to rules of professional conduct, the issue whether it was reasonable in the interests of the parties did not arise; but evidence was given to justify the proposed restraint.

Pennycuick J. granted the relief sought. The Court of Appeal affirmed that decision.

On appeal by the society and its president to the House of Lords:—

Held, dismissing the appeal (1) that the respondent as a member of the society was entitled to test in the courts the validity of a proposed rule of professional conduct and to ask for an injunction to restrain enforcement of the rule if it were held to be outside the express objects of the society; a fortiori where the alternative procedure by way of appeal from a finding of the statutory committee might leave the whole profession in doubt for an indeterminate period about the permitted scope of the trading activities by which they lived (post, pp. 420D–E, 426A–F, 429F–430B, 433D–434C, 437E–438B).

(2) That the restrictions proposed in the rule went outside the expressed objects of the society in a profession whose members had always engaged in trade, and that they were unreasonable in the interests of the members unless (*per* Lord Morris of Borth-y-Gest, Lord Hodson and Lord Upjohn) the society could prove that they were justified, which, it had declined to do (post, pp. 421D, 426G–427C, 430F–431B, 434C–435G).

Per Lord Reid. *Quaere* whether a professional body must plead and prove justification where restraints exist as part of a code of professional conduct (post, p. 421B).

(3) That the restrictions were in restraint of trade and contrary to the public interest (post, pp. 427D–H, 435G–436A, 437C–D, 440B–H).

Gunmakers, etc. (*Master, etc.*) v. *Fell* (1742) Willes 384 applied.

Jenkin v. *Pharmaceutical Society of Great Britain* [1921] 1 Ch. 392 considered.

Decision of the Court of Appeal [1967] Ch. 708; [1967] 2 W.L.R. 716; [1967] 2 All E.R. 558, C.A. affirmed.

The following cases are referred to in their Lordships' opinions:

Attorney-General of the Commonwealth of Australia v. *Adelaide Steamship Co. Ltd.* [1913] A.C. 781, P.C.

Boulting v. *Association of Cinematograph, Television and Allied Technicians* [1963] 2 Q.B. 606; [1963] 2 W.L.R. 529; [1963] 1 All E.R. 716, C.A.

City of London Case (1610) 8 Co.Rep. 121b.

Dyson v. *Attorney-General* [1911] 1 K.B. 410, C.A.

Eastham v. *Newcastle United Football Club* [1964] Ch. 413; [1963] 3 W.L.R. 574; [1963] 3 All E.R. 139.

Esso Petroleum Co. Ltd. v. *Harper's Garage (Stourport) Ltd.* [1968] A.C. 269; [1967] 2 W.L.R. 871; [1967] 1 All E.R. 699, H.L.(E.).

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Gunmakers, etc. (Master, etc.) v. *Fell* (1742) Willes 384.
Hughes v. *Architects' Registration Council of the United Kingdom* [1957] 2 Q.B. 550; [1957] 3 W.L.R. 119; [1957] 2 All E.R. 436, D.C.
Ipswich Tailors' Case (1614) 11 Co.Rep. 53a.
Jenkin v. *Pharmaceutical Society of Great Britain* [1921] 1 Ch. 392.
McEllistrim v. *Ballymacelligott Co-operative Agricultural and Dairy Society Ltd.* [1919] A.C. 548, H.L.(I.).
Mitchel v. *Reynolds* (1711) 1 P.Wms. 181.
Nagle v. *Feilden* [1966] 2 Q.B. 633; [1966] 2 W.L.R. 1027; [1966] 1 All E.R. 689, C.A.
Nordenfelt v. *Maxim Nordenfelt Guns and Ammunition Co. Ltd.* [1894] A.C. 535, H.L.(E.).
Rossi v. *Edinburgh Corporation* [1905] A.C. 21, H.L.(Sc.).
Standard Oil Co. of New Jersey v. *United States* [1951] 2 Lloyd's Rep. 36.
Swaine v. *Wilson* (1889) 24 Q.B.D. 252, C.A.

The following additional cases were cited in argument:

Attorney-General v. *Manchester Corporation* [1893] 2 Ch. 87.
Attorney-General v. *Nottingham Corporation* [1904] 1 Ch. 673.
Clark v. *Le Cren* (1829) 9 B. & C. 52.
Claygate v. *Batchelor* (1601–2) Owen 143.
Cooke v. *Turner* (1846) 15 M. & W. 727.
Cox v. *Green* [1966] Ch. 216; [1966] 2 W.L.R. 369; [1966] 1 All E.R. 268.
Daily Mirror Newspapers Ltd. v. *Gardner* [1968] 2 Q.B. 762; [1968] 2 W.L.R. 1239; [1968] 2 All E.R. 163, C.A.
Darcy v. *Allein* (*Case of Monopolies*) (1602) 11 Co.Rep. 84b.
Davenant v. *Hurdis* (1598) Moore K.B. 576.
Egerton v. *Brownlow* (1853) 4 H.L.Cas. 1, H.L.
Lawson, In re (1941) 57 T.L.R. 315, D.C.
Litchfield-Speer v. *Queen Anne's Gate Syndicate* (*No. 2*), *Ltd.* [1919] 1 Ch. 407.
Lloyd v. *Institute of Chartered Accountants*, October 11, 1961 (unreported).
London Association of Shipowners and Brokers v. *London and India Docks Joint Committee* [1892] 3 Ch. 242, C.A.
Nicholls v. *Tavistock Urban Council* [1923] 2 Ch. 18.
Permanent Trustee v. *Dougal* [1934] N.S.W.R. 83 (Australia).
Sim v. *Pharmaceutical Society of Great Britain*, January 26, 1962 (unreported).
Thompson v. *British Medical Association* (*New South Wales Branch*) [1924] A.C. 764, P.C.

APPEAL from the Court of Appeal.

This was an appeal from an order of the Court of Appeal (Lord Denning M.R., Danckwerts and Sachs L.JJ.) dated January 26, 1967, affirming an order of Pennycuick J., dated June 23, 1966, in favour of the respondent, Robert Campbell Miller Dickson, whereby it was declared that it was not within the powers, purposes or objects of the appellant society, the Pharmaceutical Society of Great Britain, to enforce or carry out or attempt to enforce or carry out the provisions of a motion passed by a general meeting of the society on July 25, 1965, on the ground that the said provisions were in restraint of trade and whereby the society and the second appellant, James Cecil Bloomfield, were restrained by injunction in terms correspond-

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